



**Ethics & Anti-Corruption Commission v Cherogoe & 3 others (Environment & Land Case 54B of 2021) [2023] KEELC 20430 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20430 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 54B OF 2021  
A OMBWAYO, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**SHADRACK KOSKE CHEROGOE ..... 1<sup>ST</sup> DEFENDANT**

**THE ADMINISTRATORS OF THE ESTATE OF SAID ABDALLA AZUBEDI  
(DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**PHELSEY ENTERPRISES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**WILSON GACHANJA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Ethics and Anti-Corruption Commission (hereinafter referred to as the applicant) has come to court for orders that the Plaintiffs case be reopened and the Plaintiff be allowed to recall its witness and to adduce additional evidence in the matter. The plaintiff be granted leave to file and the supplementary list and bundle of documents dated July 18, 2023 be deemed to be properly filed. The Defendants to be at liberty to cross-examine the Plaintiffs witness on the additional evidence adduced. Lastly that the costs of this application be in the cause. The application is based on grounds the applicant/Plaintiff instituted the instant suit against the Respondents/Defendants herein on 23<sup>rd</sup> June 2021 vide a plaint together with a list of witnesses to be called and their witness statements. The matter was heard and the Plaintiff's case was closed on the 17<sup>th</sup> July, 2023.
2. The applicant herein is seeking to introduce additional evidence they consider important documents in advancing the Plaintiff/applicant case and enabling the court arrive at a just determination of the matter. The failure to file and serve these additional documents was an oversight and an error on the part of the applicant's Counsel on record, who inadvertently while filing the instant suit left out the



said documents. The main purpose of the said additional documents herein is aimed at the realization of interest of justice on account of the proceedings before this court.

According to the applicant, this court being a shrine of justice has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities and pursuant to article 50 (1) and 159 (d) of *the Constitution* ought to grant the applicant fair trial in the circumstances. The Respondents will not suffer any prejudice as they are yet to present their case. In any event, the Respondents will have an opportunity to rebut any new evidence introduced by the said witness, which in any case will not fundamentally alter the character of the Plaintiff case as framed. It is the interest of justice for this honorable Court to allow the instant application as prayed and the circumstances herein inclines the admission of the additional documents, though outside the time frame provided for by the rules.

The application is opposed by the 1<sup>st</sup> defendant on grounds that the application does not disclose what is it that the plaintiff intends to prove which is not already on record. That the plaintiff having closed its case, it is the court and not the plaintiff that can call for further evidence. That the principle governing an application such as the current one before the court is that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed. That the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously.

3. According to the 1<sup>st</sup> defendant, the plaintiff has not explained why it omitted to file the documents now being sought to be filed and produced. Mistake of a counsel is not a sufficient reason. The application herein is an afterthought. The plaintiff is on a fishing expedition, and trying to collect evidence as the matter progresses. That the 1<sup>st</sup> defendant had already strategize on how to defend the case before the court and thus allowing more evidence will prejudice his defense.
4. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants opposes the application on grounds that the Plaintiff having closed its case, it is the court and not the Plaintiff that can call for further evidence. They contend that the application is an afterthought meant to fill in gaps in evidence arising out of questions put forward to plaintiffs' witnesses and a pure fishing expedition. The Applicant has not explained and/or given sufficient reasons for the inordinate and/or unexplained delay in filing the documents being sought to be filed. That it is trite law that in such an application before the court, the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed.
5. The defendants argue that since the honorable courts power to allow or disallow the application is discretionary, the court should not exercise its discretion in favour of the applicant as it does not disclose what It intends to prove before court on what it has already filed of adduced evidence before court. That allowing the application will prejudice the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as they had already prepared on how to defend the case.
6. I have considered the positions taken by all parties and the fact that This court retains discretion to allow re-opening of a case which discretion must be exercised judiciously and that in exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by in ordinate and unexplained delay.
7. I have also considered the Australian case *Smith -versus- New South Wales* [1992] HCA 36; (1992) 176 CLR 256 , where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against



the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

8. I do find that the defendant have not demonstrated the prejudice they will suffer if the document is produced since they will be allowed to cross examine the witness who will produce the document. Though the plaintiff has closed its case, the defendant case has not been heard and therefore they are at liberty to challenge these documents. Moreover, the application is filed timeously after the close of plaintiff’s case. The upshot of the above is that the application is allowed, thus the plaintiffs case is reopened and the plaintiff is allowed to recall its witness and to adduce additional evidence in the matter. The plaintiff is granted leave to file and the supplementary list and bundle of documents dated July 18, 2023 be deemed to be properly filed. The defendants are at liberty to cross-examine the plaintiff’s witness on the additional evidence adduced. Lastly that the costs of this application be in the cause.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 29<sup>TH</sup> DAYS OF SEPTEMBER 2023.**

**A. O. OMBWAYO**

**JUDGE**

